VON HOLST'S PUBLIC LAW OF THE UNITED STATES.[1]

THERE is nothing which more excites the admiration of a true scholar than the courage and zeal with which the great German *savants* undertake the most gigantic tasks in science and letters, as there is nothing more satisfactory than the manner and success with which they master and complete them. Dr. Heinrich Marquardsen, professor in Erlangen, and member of the imperial parliament and of the Bavarian chamber of deputies, has recently placed the jurists and political scientists of the whole world under obligations to him through his assumption of the direction of one of these immense enterprises. Assisted by forty-two of the most capable publicists of Germany, France, Austria, Switzerland, Belgium, Denmark, and Norway, he has undertaken to make the public law of the civilized world accessible. The title of the work is *Handbuch des Oeffentlichen Rechts.* It is to consist of four stout volumes, each divided into half-volumes, and each of these into a number of parts. Three volumes, and four parts of the first half of the fourth have already appeared. The first volume sets forth the general principles of public law and political science. The second gives the public law of the German empire, of Alsace-Lorraine, and of Prussia and Saxony. The third deals with the rest of the states of the German empire. The fourth is to embrace the rest of Europe, and North and South America.[2]

[1] Handbuch des Oeffentlichen Rechts der Gegenwart, in Monographien. Herausgegeben von Dr. Heinrich Marquardsen. — Vierter Band, erster Halbband, dritte Abtheilung: Das Staatsrecht der Vereinigten Staaten von Amerika. Bearbeitet von Dr. von Holst. Freiburg i. B. 1885. — Lex. 8vo, vii, 189 pp.

[2] A full list of titles and authors shows more clearly than any *résumé* the extraordinary range of this great work, and its value.

I. BAND. (Allgemeiner Theil.)

I. *Halbband.*	II. *Halbband.*
Marquardsen, Einleitung.	Sarwey, Allgemeines Verwaltungsrecht.
Gareis, Allgemeines Staatsrecht.	Bulmerincq, Völkerrecht.
Hinschius, Staat und Kirche.	Marquardsen, Politik.

It is not my purpose to attempt a review of the entire work in this paper. A year's study and a volume, at least, would be necessary for this; but I do not hesitate to affirm, even from a limited examination, that this vast production is, in my opinion, the most important contribution which this century has made to the study of public law and political science. It is somewhere related that when Professor Agassiz first heard the venerable President Hitchcock, of Amherst College, expound

II. BAND. (Staatsrecht des deutschen Reichs und der deutschen Einzelstaaten.)

I. *Halbband.*	II. *Halbband.*
Laband, Deutsches Reich.	Schulze, Preussen.
Leoni, Elsass-Lothringen.	Leuthold, Sachsen.

III. BAND. (Fortsetzung des Staatsrechts der deutschen Einzelstaaten.)

I. *Halbband.*

Vogel, Bayern.
Gaupp, Württemberg.
Schenkel, Baden.
Gareis, Hessen.

II. *Halbband.*

Büsing, Mecklenburg-Schwerin und Strelitz.
Becker, Oldenburg.
Otto, Braunschweig.
Pietscher, Anhalt.
Böttcher, Waldeck.
Bömers, Schaumburg-Lippe.
Falkmann, Lippe.
Meyer, Sachsen-Weimar-Eisenach.
Kircher, Sachsen-Meiningen.
Sonnenkalb, Sachsen-Altenburg.
Forkel, Sachsen-Coburg und Gotha.
Klinghammer, Schwarzburg-Rudolstadt.
Schambach, Schwarzburg-Sondershausen.
Liebmann, Reuss ältere Linie.
Müller, Reuss jüngere Linie.
Molffson, Hamburg.
Klügmann, Lübeck.
Sievers, Bremen.

IV. BAND. (Staatsrecht der ausserdeutschen Staaten.)

I. *Halbband.*	II. *Halbband.*
Ulbrich, Oesterreich-Ungarn.	*Engelmann, Russland.
Von Orelli, Schweiz.	*Aschehoug, Schweden und Norwegen.
Von Holst, Vereinigte Staaten von Amerika.	*Goos, Dänemark.
De Hartog, Niederlande.	*Marquardsen, Grossbritannien und Irland, britische Colonien.
*Nys, Belgien.	*Saripolos, Griechenland.
*Eyschen, Luxemburg.	*Manole u. A., Romänien, Serbien, Türkei.
*Lebon, Frankreich.	
*Brusa, Italien.	

The treatises starred (*) may be expected during the present year. The last half-volume will also treat of Spain and Portugal, Mexico, Brazil, and the other states of South America, and those of Central America. The time for the appearance of this (concluding) portion of the work is not yet fixed.

The "Handbook" is published at Freiburg, Baden, in the akademische Verlagsbuchhandlung von J. C. B. Mohr.

the geological formation of the Connecticut Valley, he said, "This is beautiful *description;* but true science is *comparison.*" This is true not only of natural science, but also of jurisprudence and political science; and as the method of Agassiz marked a new era in American geology, so will this great work of Marquardsen conduct the student into those rich fields of comparative study in public law and polity, from which a new and deeper view of these subjects must result.

Of course the topic of highest interest to the American student treated in this work is the public law of the United States; and it is Dr. von Holst's treatise on this topic that I propose to examine. It is a most valuable thing to study the civilization of one's own land and country from a foreign standpoint. One gets thereby a bird's-eye view of the course and relation of events and institutions and of social forces — a view which is almost unattainable while floating in the common current. And it is especially valuable when such a view can be had under the direction of one who can look beneath the surface, and guide attention not only to the *ensemble*, but also to the *forces profondes.* The author of this part of Marquardsen's vast work possesses these qualities in an eminent degree. A great historian and publicist, both by genius and training, he has devoted years of patient and careful study to our laws, customs, and institutions. He has dwelt among us, visiting our halls of legislation, our bureaux of administration, our courts, our universities, colleges, schools, churches, and charitable establishments. He has used the material which we have collected in our libraries, and he has had the advantage of personal contact with many of our most prominent men. He has had the near view and the distant view. He could both sympathize and criticise. No one could be better fitted than he to do the work which he has undertaken and so creditably accomplished.

It is true that there are some mistakes in the book, but they are mostly in the minor details; and I only wonder that there are not ten times as many. There is no state in the civilized world whose public law is so complicated as that of the United

States, save perhaps that of Germany. I do not believe that there is an American living who knows it in all its details. That a foreigner could write this book and fall into so few errors as Professor von Holst has done, is a marvel.

In the first place, the logical arrangement of the work is most admirable. The first twenty pages are devoted to the genesis of the Federal constitution; the next one hundred and twenty-one to the exposition of the Federal constitution; and the last forty of the text to the comparative constitutional law of the commonwealths. This last division is an entirely new contribution to the literature of our public jurisprudence. So far as I am aware, this subject has nowhere else, as yet, received any satisfactory treatment, save in the private lectures of a few professors. In these general divisions the author has followed the usual course. It is in the subdivisions, especially of the second part, that the newness and logical excellence of his arrangement appear. He classifies the provisions of the constitution and our fundamental statutes and customs under the categories of political science, thus bringing the scattered element of our public law into organic combination. This is a great aid to the student; and the author deserves and has our most grateful acknowledgment for this contribution to the science of method.

The general results to which he comes are, I think, indisputable. He denies that the constitution is in any sense a compact between states, and asserts it to be a real constitution; a fundamental and organic law, ordained by the people of the United States (page 25). He refuses to call the opening clause a preamble; he regards it as the most important provision of the instrument, as "the enacting clause" of the whole constitution (page 23); and he declares that the people through the constitution have conferred upon the organs of the general government the right and the duty of compelling obedience to the constitution and the laws, no matter how or from whom resistance to them may come (page 26). He does not, of course, regard the United States at the present stage of development as a purely national, consolidated system. Not only is the govern-

mental system dual, but the people of the United States is a body acting through a distinct organization in each commonwealth (pages 27, 28); and the author does not prophesy the transformation of this system in the immediate future, though he remarks in many places the steady nationalization of our interests and ideas. In respect to the distribution of powers and functions through our entire system, he has discerned rightly, in the main, the tendencies which our history is revealing. He remarks the continual expansion of the powers of the central government, especially of the Congress; the increasing restrictions upon the legislation of the commonwealths; and the growing autonomy of the municipalities.

The method, the spirit, and the general conclusions of the whole work are so excellent, so stimulating, and so accurate that I hesitate to mar the general effect upon the mind of the reader by calling attention to some minor errors and defects which the demands of scientific criticism will not allow to be ignored.

In my review of these points I will simply follow, as to order, the paging of the book. At the bottom of page 14, speaking of the original ratification of the constitution of 1787 by conventions of the people in the several commonwealths, the author affirms:

> In case four or a less number of states refused ratification, they would thereby *legally* go out of the Union, until they were pleased to re-enter the same or until the other states perhaps forced them to re-enter under the pressure of an unavoidable necessity.[1]

This does not appear to me to be sound political science. The law and facts in reference to the ratification of the constitution were briefly as follows:

(1) *The law.* We were living under the Articles of Confederation of 1777. They were the supreme law of the land. They contained a provision for the making of all future changes in the organic law; which, of course, impliedly stamped all changes

[1] "Falls vier oder weniger Staaten die Ratifikation verweigerten, schieden sie also ipso facto rechtlich aus der Union aus, bis sie für gut fanden neu in dieselbe einzutreten oder die anderen Staaten sie vielleicht unter dem Druck einer unabweislichen Nothwendigkeit dazu zwangen."

made in any other manner as extra-constitutional and illegal. That provision (article xiii.) ordained:

> And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

The strictly *legal* effect then of the rejection of the plan of the Convention of 1787 by any state would have been the defeat of the plan and the maintenance of the Union of all the states under the existing articles; and if, nevertheless, those ratifying the plan chose to put it into operation over themselves, *they* must be regarded as having withdrawn from the Union in violation of law and plighted loyalty.

(2) *The facts.* The system established by the Articles of Confederation had proved a failure. Under it we were drifting surely and rapidly into helplessness and anarchy. Repeated attempts were made to strengthen the system by amending the articles in the regular and legal way provided. They all failed because of the inflexibility of the method. Certain of the more far-sighted statesmen of the day began to feel that, judged from the standpoint of our history and the actual relation of our political society, the Confederate system, in its law of amendment as well as every other provision, had been from the beginning a misinterpretation. Governor Bowdoin of Massachusetts spoke it out boldly in his message of May 31, 1785, to the legislature, and secured from that body instructions to the delegates of Massachusetts in the Confederate Congress to move, in this assembly, the summoning of a convention of the people of the whole confederacy to revise the constitution; but these delegates were so frightened at the revolutionary character of the proposition that they disobeyed the command of the legislature which sent and instructed them, and never presented the project at all.[1] On the other hand, the more politic Hamilton, supported by Madison, took advantage of the occasion offered

[1] Curtis, History of the Constitution, vol. i., pp. 336 ff.

by the commercial convention at Annapolis in the autumn of 1786 to so expand the subjects under consideration as to make it appear evident that the whole Confederate constitution was involved in the solution of the commercial question, and that therefore a new convention, composed of delegates from all the states, ought to be assembled for the purpose of suggesting such changes in the constitution as would make the system adequate to the needs of the Union. They succeeded in bringing the Confederate Congress to the point of issuing the call for such a convention, directing that its sole and express purpose should be the revision of the Articles of Confederation; that it should report the same to the Congress and the state legislatures; and that its suggestions should become parts of the constitution when agreed to in Congress and confirmed by the states.[1] When, however, this Convention met in May of 1787, it was found that one state (Rhode Island) had sent no representatives. This was tantamount to a notification that Rhode Island would not ratify any changes which the Convention might propose looking to a consolidation of the Union; and if she would not, then legally the work of the Convention would be useless. The Convention was thus forced from the outset to propose some other method of ratification than that contained in the Confederate constitution. But that was the only legal method. Anything else was extra-legal, unconstitutional, revolutionary. There was certainly no power in the Convention to change the clause of amendment of the Confederate constitution any more than any other provision of that instrument. The exact legal position of the Convention was that of an advisory body to the Confederate Congress. It was in no sense a sovereign body. It could only resolve to propose; and such a resolution could not place the stamp of legality upon anything.

Nevertheless it coolly declared: "The ratification of the conventions of *nine* states shall be sufficient for the establishment of this constitution between the states so ratifying the same."[2] If the Convention had submitted this provision separately and

[1] Journal of the Confederate Congress, February 21, 1787.

[2] Constitution of the U. S., Art. vii.

antecedent to the other parts of their draft to the Congress, and the Congress had approved and referred the same to the state legislatures, and these had unanimously ratified it, then it would have been legal and regular to have applied the new method of amendment and revision to the other parts of the plan; but such was not the procedure. The Convention knew well enough that this could not be accomplished. It therefore wrote this provision at the very end of the draft, and sent it as a part of the same to the Congress. It was certainly a shrewd move; and the proposed method of action undoubtedly corresponded much more nearly to the natural conditions and relations of our political society than did the provision of the Confederate constitution applicable to the case; but from a strictly legal standpoint it was a revolutionary proposition on the part of the Convention, and the reception and approval of this proposition by the people was a revolutionary act on their part. As tersely as I can express it, what happened was this: The natural leaders in the nation invoked a force unknown to the constitution to assert itself as the sovereign power, and at the same time to declare the form of organization under which it would act and the majority sufficient to give validity to the act; and the regularly constituted powers felt compelled to stand aside and see this new self-constituted sovereignty occupy the ground. They actually put the new system into operation while two of the states were still holding out against its adoption, and assumed such an attitude towards these as to make them quickly feel that further resistance would be disastrous. It seems to me, then, that an exact political science would lead us to abandon any attempt to find a *legal* justification for the manner in which the constitution of 1787 was established. We should accept fairly and fully the proposition that the constitution of 1787 rested originally upon a revolutionary basis, and justify the fact upon the principle of public necessity. But this proposition has at least one very important corollary and teaches at least one very important lesson. If the creation of the present constitution was a revolutionary act, justified on natural and moral grounds, then the method of procedure and the effect

of the act should be such as political science would dictate. Now political science would pronounce that, in a naturally popular political society, the undoubted majority should act for the whole in the original establishment of an organic law, and that the attribution of a power to such a majority to *destroy* a previous system of organization for the whole, without the corresponding power to *construct* a new system for the whole, is state suicide. This is the corollary. The lesson is that, in constructing provisions for amending a constitution, the original sovereign should never dethrone himself, nor depart too far from the method of action originally followed, if legal continuity in political growth is to be preserved. This leads me directly to notice a dictum of the author, upon this very subject, which appears to me very doubtful, to say the least. On page 19 he writes:

> Experience has accordingly shown that the provisions of the constitution in reference to amendment sufficiently permit the imperative demands of the developing relations to be met and disposed of satisfactorily [*etc.*].[1]

The great and significant value of a method of constitutional amendment is its capacity to prevent recourse to violence in the solution of the great questions of internal politics. If it does not do this in any degree, it has no value at all. We know that the amending power in our constitution has not preserved us from civil war in the past. We know that for sixty years it did not do one single thing to clear away the mass of error with which our public law was becoming more and more encrusted. We know that while natural conditions were working more and more towards national consolidation, the interpretation of our political system was pointing more and more towards confederation and anarchy, and that in spite of our growth in national unity not one single power has ever been conferred upon the national government by the process of amendment,

[1] "Die Erfahrung hat mithin gezeigt, dass die Bestimmungen der Konstitution über Verfassungsänderungen auf der einen Seite es in hinlänglicher Weise ermöglichen, gebieterischen Anforderungen der sich entwickelnden Verhältnisse gerecht zu werden," *etc.*

except after, and as the result of, successful war. Whether a more facile method would have saved us from the appeal to arms may well be doubted. Whether the present form will serve us better in the future than it has in the past is unknown. Of one thing I feel sure, however, that the author's declaration that it has been and is a satisfactory solution of the question is an assumption.

On page 31, in treating of the power of Congress to make all laws necessary and proper for executing the powers vested in the government of the United States, the author writes:

> Whether [such laws] are proper, Congress alone shall judge; it is not a legal but a political question.[1]

This appears to me a little extravagant. I believe all American jurists would agree that the case which concedes to Congress the widest powers under this provision is that of Juilliard *vs.* Greenman.[2] Justice Gray's words upon the subject are as follows:

> By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.[3]

That is, the court shall determine the general sphere of the appropriate, and the Congress may exercise the choice of means within that sphere. If this be not the meaning of the dictum, then the proper course for the court to pursue would have been to decline jurisdiction; but it did not do so. It proceeded to determine upon the appropriateness of the Congressional act in these words:

> We are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal

[1] "Ob sie geeignet sind untersteht allein seinem Urtheil; es ist nicht eine Rechtsfrage, sondern eine politische Frage."

[2] 110 U. S. Reports, p. 421.

[3] *Ibid.*, p. 440.

tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress [*etc.*] . . . It follows that the act . . . is constitutional and valid.[1]

That is, the court determines the appropriateness, and the Congress may select any one of several means, all appropriate, which appears to it the most advantageous.[2]

On page 42, in considering the effect of the fifteenth amendment upon the extension of the suffrage, the author affirms :

Contrary to a widely received view, the courts have decided in all direct cases that no one has received the suffrage through this amendment.[3]

Doubtless the author obtained this idea from the case of the United States *vs.* Reese.[4] But subsequent to that case, and yet several years previous to the appearance of the work we are now reviewing, the court, in two direct and noted cases,[5] qualified its previous utterances. In *Ex parte* Yarbrough the court said :

While it is quite true, as was said by this court in United States *vs.* Reese, that this Article [the fifteenth amendment] gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons.

[1] 110 U. S. Reports, p. 450.

[2] The author repeats his view upon this subject on page 36, in terms which indicate that we have to do not with a simple infelicity of expression, but with a deliberate opinion. He says: "So z. B. hat nicht das Gericht, sondern lediglich der Kongress darüber zu befinden, ob die von ihm zur Ausübung einer verfassungsmässigen Befugniss erwählten Mittel 'nothig und geeignet' sind."

[3] "Im Gegensatz zu einer weit verbreiteten Ansicht ist von den Gerichten in allen einschlägigen Fällen entschieden worden, das Niemand durch dieses Amendement das Stimmrecht erhalten hat."

[4] 92 U. S. Reports, 214.

[5] Neal *vs.* Delaware, 103 U. S. Reports, 370; *Ex parte* Yarbrough, 110 U. S. Reports, 651.

And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women.

In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer upon the negro the right to vote, and Congress has the power to protect and enforce this right.[1]

Evidently the proposition of the author upon this subject can be received only after very important modification.

On page 52 the author discusses the question of the presence of the cabinet officers in the legislative (Congress), and expresses the following opinion :

But the Congress knows too well how greatly the position of the executive over against itself would become strengthened should the secretaries be allowed to appear and speak in the Senate and House, and its tendency to elevate its own dignity and expand its own powers at the cost of the executive is too pronounced, for those who regard such a change of practice as one of the most urgent and important reforms to hope for any speedy realization of their view.[2]

If I understand the author, he means to teach that, according to his own political science, the effect of giving the secretaries the right to appear and speak in Congress would be to strengthen the executive. This appears to me, to say the least, very dubious. The facts of history seem to me to be all on the other side, even when the ministers have seat and vote and power to dissolve as well as voice in the legislative chambers; and certainly the author's theory is not generally held by the jurists and statesmen of Europe. The recent conflict in Norway between the king and the parliament turned on this very question; and the crown lawyers all held that voice, without seat and vote and right to dissolve, would lead to the subordina-

[1] *Ex parte* Yarbrough, 110 U. S. Reports, 665.

[2] "Allein der Kongress ist sich zu gut dessen bewusst, wie sehr die Stellung der Executive ihm gegenüber dadurch gekräftigt werden würde, dass die Secretäre im Senat und Representantenhause das Recht des Wortes erhielten, und seine Tendenz geht zu entschieden dahin, auf Kosten der Executive das eigene Ansehen zu erhöhen und die eigene Machtsphäre zu erweitern, als dass diejenigen, die in dieser Aenderung eine der dringlichsten und bedeutsamsten Reformen erblicken, hoffen dürften, bald mit ihrer Ansicht durchzudringen."

tion of the ministers, and therefore of the executive, to the legislature. If the author had only written that the members of Congress *think* they know, in place of "the Congress knows too well," then I could have passed over this paragraph without a word of criticism or dissent.

On page 66, in treating of the limitation upon the tax-power of Congress, we find the following sentence:

> Congress cannot tax state property, *such as a railway*, nor the salaries of state officers, nor municipalities and their property, *etc.*[1]

Is it possible that the author thinks that we have railways belonging to the states, and that the constitution or the court has denied to Congress the power to tax them; or is this simply a fancied example of his own? If the former, we should like to know the sources of his information. He cites McCullough *vs.* Maryland (4 Wheaton, 316), Veazie Bank *vs.* Fenno (8 Wallace, 533), and the Collector *vs.* Day (11 Wallace, 113), in support of the entire proposition — and, I suppose, of the particular part of his proposition which is here traversed — but there is not a word in any one of these cases for him to rest upon. It is true the court has said that the necessary agencies for legitimate purposes of state government are not proper subjects of the taxing power of Congress;[2] but it has never said that a railway is such an agency, and it has always shown the disposition to give as narrow a definition as possible to the phrase, necessary agencies or instrumentalities of government. In one of these very cases the court said:

> A railroad company, in the exercise of its corporate franchise, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad.[3]

[1] "Von dem Kongress dürfen nicht besteuert werden: staatliches Eigenthum wie eine Eisenbahn, Gehalte der Staatsbeamteten, Munizipalitäten und ihr Eigenthum, u. s. w."

[2] Collector *vs.* Day, 11 Wallace, 113.

[3] Veazie Bank *vs.* Fenno, 8 Wallace, 533, 547.

It is true that this is not exactly saying that a railway owned by the state, and not simply chartered by it, is subject to the tax-power of Congress; but it indicates that, if it indicates anything in regard to the subject. It is no more contemplated, in our system, that a state may withdraw railroads from the tax-power of Congress by becoming the owner of them, than that it may defeat an excise upon tobacco and whiskey by making them state monopolies, or prevent the collection of customs by doing the importing trade for its citizens itself. I have no doubt we shall ere long be called upon to contemplate questions relating to a more extended state ownership of property; but the matter belongs with us as yet in the domain of political economy, while our author has professedly written a law book. If, however, this example be but a matter of personal fancy, then we must say that the illustration is badly chosen, is misleading, and should be discarded.

The treatment of the subject of foreign commerce and of commerce between the states, is to my mind the most unsatisfactory part of the book. It is true that these subjects have not been elucidated at every point by decisions of the courts, and that the reconciliation of all the decisions is not without some difficulty; but I do not think that the confusion is at all so great as the author represents. For instance, on page 78, he says:

> The Supreme Court has decided, in the license cases (5 Howard, 504), that the states may, under certain presuppositions, require a license for trade in imported liquors or in liquors transported from another state, while the older case of Brown *vs.* Maryland (12 Wheaton, 419) had decided that, in general, the rights of importers to sell could not be impaired by the states through the demand that the vendors should procure a license.[1]

[1] "Ferner hat das Oberbundesgericht in den License Cases (Howard V., 504) entschieden, dass die Staaten den Handel mit importirten oder aus einem anderen Staate eingeführten Spirituosen unter gewissen Voraussetzungen an die Bedingung des Besitzes eines Berechtigungsscheines (license) knüpfen dürften, während es in dem älteren Falle Brown *v.* Maryland (Wheaton XII., 419) entschieden hatte, dass im Allgemeinen die Verkaufsberechtigung der Importeure nicht von den Staaten durch die Forderung der Lösung eines Berechtigungsscheines beeinträchtigt werden dürfe."

The point decided in the older case was, as every well-informed jurist in the United States knows, that a state law, requiring an importer to take out a license before he be permitted to sell a *package* of imported goods, is in conflict with that provision of the constitution of the United States which declares that "no state shall . . . lay any impost or duty on imports," *etc.*, and also with the clause which declares that Congress shall have power "to regulate commerce," *etc.* In this very case the court says: "This state of things is changed if he [the importer] sells them, or otherwise mixes them with the general property of the State, by breaking up his packages," *etc.*[1] In short, Brown *vs.* Maryland protects the unbroken package imported from a foreign country in the hands of the importer. The license cases did not touch this point except by way of *obita dicta*, and in every case to affirm the principle of the earlier decision. Two of these cases had reference to a license tax upon articles in the retail, or after they had left the hands of the importer; and the other to domestic traffic between the states. I do not therefore see the contradiction which the author indicates between the decisions. If he had consulted the later cases of Welton *vs.* Missouri,[2] and Henderson *vs.* Mayor of New York,[3] neither of which I find anywhere referred to in his work, it appears to me that he would have treated this whole subject with more clearness and intelligence; but even with the light which he confesses to have had, I cannot help feeling that he has made the matter unnecessarily difficult to himself and to his readers.

On page 83, I find the following statement:

> Copyrights and patents, according to the existing laws, are granted to citizens and inhabitants of the United States for 28 years. . . .[4]

Section 4884 of the Revised Statutes of the United States fixes the term of a patent at seventeen years; and I have in vain searched the statutes at large, passed subsequent to the adop-

[1] Brown *vs.* Maryland, 12 Wheaton, 419, 443.

[2] 91 U. S. Reports, 275.

[3] 92 U. S. Reports, 259.

[4] "Verlagsrechte und Patente werden nach den bestehenden Gesetzen Bürgern und Einwohnern der Vereinigten Staaten auf 28 Jahre ertheilt. . . ."

tion of the Revised Statutes for any revision of this subject. It is possible that this error may be only a slip of the pen.

At the bottom of the same page (83) the author writes in regard to the power of Congress to punish piracy:

> Since piracy is a concept of international law, Congress is not obliged to define it; but whatever is piracy, in international law, falls under the penalties affixed by Congress to that crime. Nevertheless, Congress has the power to declare crimes piracy which are not so in international law, and to punish them as such.[1]

The latter sentence can stand only under a very important limitation, which has here been omitted; *viz.*, when the person convicted of such a crime is subject to the jurisdiction of the United States. The very case which the author cites in support of his doctrine, *viz.* The Antelope, declares:

> If it [the slave-trade] is consistent with the law of nations, it cannot in itself be piracy. It can only be made so by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.[2]

I cannot believe that the author was not aware of this limitation. It is too much a principle of natural reason for that. I put it down simply as an oversight in rapid and terse composition.

On page 96, in considering the question of the power of Congress to govern the territories, the author writes:

> The opinion of the Supreme Court of the United States that this authority is to be found in the war and treaty-making power was universally approved.[3]

He then proceeds to raise the question, whether under such an interpretation Congress has any power at all to govern such

[1] "Da der Seeraub ein völkerrechtlicher Begriff ist, ist der Kongress nicht zur Definirung desselben verpflichtet, sondern was nach dem Völkerrecht Seeraub ist, verfällt auch der von ihm für denselben festgesetzten Strafe. Wohl aber ist er berechtigt, auch Verbrechen, die völkerrechtlich nicht Seeraub sind, für Seeraub zu erklären und als solchen zu bestrafen."

[2] The Antelope, 10 Wheaton, 66, 122.

[3] "Die Ansicht des Oberbundesgerichts, dass es in dem Kriegs- und Vertragsrecht gegeben sei, hat denn freilich allgemeine Zustimmung erfahren."

territory as was not acquired through treaty. The first great case upon which we rest for the authoritative exposition of this subject is the American Insurance Company *vs.* Canter,[1] where the court declared that Florida, which was acquired by treaty with Spain, was a territory of the United States,

> governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

The court then added:

> Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.[2]

It is evident here that the court declares the opposite view from that attributed to it by the author, though it admits that there may be a question. The case of Dred Scott *vs.* Sandford[3] takes the ground that the clause to make all needful rules and regulations, *etc.*, "applies only to the particular territory of which we have spoken," — *viz.*, that within the limits of the United States at the time of the formation of the constitution and which had been or then was claimed by a state, — "and cannot, by any just rule of interpretation, be extended to territory which the new government might afterwards obtain from a foreign nation." The court in this case declares[4] that the power to govern *such* territory is "the inevitable consequence of the right to acquire territory"; and labors hard to show that this view is in harmony with that expressed in the American Insurance Company *vs.* Canter. Finally, in the *post bellum* case of the National Bank *vs.* County of Yankton, the court declares:

> It is certainly now too late to doubt the power of Congress to govern the territories. There have been some differences of opinion as to the

[1] 1 Peters, 511.
[2] *Ibid.*, p. 542.
[3] 19 Howard, 393.
[4] *Ibid.*, pp. 442, 443.

particular clause of the constitution from which the power is derived, but that it exists has always been conceded.[1]

I cannot see under these decisions what practical difficulty could ever arise or could ever have arisen in regard to the question. All the territory that we have, and all that we ever had, or could have had, or can have, must fall under one or the other of two divisions; *viz.*, what we had when the constitution was adopted, and what we have acquired since or may acquire; and these decisions certainly provide for all the exigencies of both cases under any view which the court has ever taken of the question. It would indeed be a great triumph in juristic scholarship for a foreign commentator upon our constitution to convict the supreme interpreting organ in our system of erroneous or faulty construction. I can easily comprehend, too, that the desire to win such a victory might tempt the mind of the fairest critic to some exaggeration of the imperfections of his subject. I hope I should be one of the last to detract in the least from the former or to make too much of the latter; but I cannot help feeling that in this matter our learned author has found a mare's nest in place of a mine of truth.

On page 101, in treating of the admission of new states, the clause of the constitution (article 4, section 3, paragraph 1) which reads:

> But no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress

is translated into the German language as follows:

> Aber kein neuer Staat soll innerhalb des Jurisdiktionsgebietes eines anderen Staates gebildet oder errichtet werden;[1] noch soll ohne die Zustimmung der Legislaturen der betreffenden Staaten sowie des Kongresses durch die Vereinigung von zwei oder mehr Staaten oder Theilen von Staaten ein Staat gebildet werden.

The numeral ([1]) refers to a footnote, which reads:

> [1] 101 U. S. Reports, 129, 132.

Der Kongress hat sich jedoch für befugt gehalten nach der Sezession von Virginia den loyal gesinnten Theil des Staates zu autorisiren, unter dem Namen von West Virginia sich als eigenen Staat zu konstituiren.

The Congress nevertheless considered itself empowered, after the secession of Virginia, to authorize the loyal part of the state to constitute itself as a separate state under the name of West Virginia.

It is plain, from the juxtaposition of the words in the author's translation and the language of the note, that he thinks the constitution places an *absolute* prohibition upon the formation of any new state within the jurisdiction of any other state, and that the conditional words at the close of the provision apply only to the cases when the new state is formed by the union of two states or parts of two states. This is a new idea to me, and I cannot imagine where the author could have found it. He certainly must have read the enabling act of Congress,[1] erecting the western counties of Virginia into the state of West Virginia; he must have observed that Congress there recites with all particularity, as the basis of its own act, the consent and request both of the convention which framed the new state constitution and of the legislature of the State of Virginia; and he ought to know, if he does not, that there is a Supreme Court decision[2] which treats this act of the Congress as entirely regular and legal, and confirms, upon the basis of it, the jurisdiction of the new state over two counties concerning which a controversy existed between it and Virginia. Is it possible that he means to teach that the loyal legislature of Virginia, — recognized by Congress and the President as *the* legislature of that state, — which gave its consent to the formation of the new state, was not the real legislature of Virginia? I cannot attribute such a view to him. I do not believe that he entertains it. He is too sound a political scientist for that. I must leave it to him to explain this extraordinary view himself in the later edition of his work.

On page 102 the author comes upon the very important question as to the power of Congress to lay down conditions in the

[1] Act of Dec. 31, 1862. U. S. Statutes at Large, vol. xii., pp. 633, 634.

[2] Virginia *vs.* West Virginia, 11 Wallace, 39.

enabling acts admitting new states. He declares that the fundamental principle of the constitution, in this respect, is absolute equality between the states; and therefore, if the Congress in these acts undertakes to impose upon the states admitted under them conditions which do not rest upon the original states, such conditions are not *constitutionally* binding upon the state after admission; they are only compacts which the state is *morally* bound to observe. He admits, of course, that Congress has imposed such conditions, and explains the fact as follows:

> Congress would hardly have demanded the conclusion of such compacts, and, if it had, its action would been universally disapproved, except for the fact that the slavery question and later the civil war and the abolition of slavery created such relations that legal scruples were necessarily thrust into the background by political and moral considerations.[1]

This is undoubtedly the *ante bellum* state sovereignty view of the subject; but if such acts on the part of Congress are *now* considered as contrary to the spirit of the constitution, how does the author explain the fact that after the abolition of slavery and the cessation of war, and in regard to quite other subjects, Congress still continues to impose these extra-constitutional conditions? The enabling acts in the cases of Nevada,[2] Nebraska,[3] and Colorado,[4] contain provisions which decree religious toleration, and forbid discrimination against citizens of the United States residing out of these states in the taxation of land, and require of the conventions framing the constitutions of these states ordinances pledging the irrevocability of these conditions except by consent of the United States. The original states had perfectly free hand in reference to these subjects.

[1] "Der Kongress würde auch schwerlich ihren [*sc.* derartiger Pakten] Abschluss gefordert haben, und hätte er es gethan, so wäre es allgemein missbilligt worden, wenn nicht die Sklavenfrage und später der Bürgerkrieg und die Aufhebung der Sklaverei Verhältnisse geschaffen hätten, in denen die rechtlichen Bedenken durch die politischen und sittlichen Erwägungen in den Hintergrund gedrängt wurden und werden mussten."

[2] Act of March 21, 1864. U. S. Statutes at Large, vol. xiii., p. 30.

[3] Act of April 19, 1864. U. S. Statutes at Large, vol. xiii., p. 47.

[4] Act of March 3, 1875. U. S. Statutes, vol. xviii., part 3, p. 474.

Will the German commentator declare the Congress in error in these cases? The court has not done so, and until this happens the interpretation which the Congress puts upon its constitutional powers is authoritative. The only ground which we have to rest upon as yet in criticising the same is what political science furnishes. From such a standpoint it seems to me that the preservation of civil rights is a far more fundamental principle of our system and of any constitutional system than the preservation of equal autonomy to the states. In fact, the great argument in political science for state autonomy is that, generally, civil rights are better preserved under such a system than under a completely centralized system. If, however, that autonomy be exercised to suppress civil rights, the great purpose of its existence fails. We know that this has happened in our history, and that we have repeatedly invoked the deeper principle with which to combat it. It seems to me that it would be more scientific as well as more liberal-minded to acknowledge this power to Congress as a part of our constitutional practice, and to concede that the authority vested in Congress for maintaining republican institutions, preventing the abridgment of the privileges and immunities of citizens of the United States, and protecting life, liberty, and property against any undue process of law, cover it with constitutional legitimacy.

On page 127 the author quotes that part of article 4, section 4, of the constitution which provides that "the United States shall guarantee to every state in this Union a republican form of government," and says: "This is the only constitutional provision which imposes a duty upon the United States."[1] The author probably means that this is the only provision imposing an *express* duty; for the paragraph in which he makes this statement is headed "Express Obligations." But even with this limitation the statement is inaccurate. The remainder of the section declares that the United States shall protect each of the states against invasion and, upon application of the proper state

[1] "'Die Vereinigten Staaten sollen jedem Staat in dieser Union eine republikanische Regierungsform garantiren' (Art. IV., Sekt. IV.). Das ist die einzige Verfassungsbestimmung die den Vereinigten Staaten eine Pflicht auferlegt."

authority, against domestic violence. Here certainly are other duties expressly imposed.

Moreover, according to my understanding of the constitution, there are many duties impliedly imposed upon the United States which the author nowhere remarks. Take, for instance, the thirteenth amendment, prohibiting slavery and empowering the Congress to enforce this article by appropriate legislation. Will the author claim that this imposes no duty upon the Congress to enact such laws as will carry out this provision? If this be so, then the law-making power can defeat the commands of the constitution-making power by failing to enact the measures necessary for its execution. The author does not sufficiently distinguish between that part of the constitution which merely enumerates the subjects upon which Congress shall have power to legislate, and that part which enacts the law itself and leaves to Congress only the work of elaborating the measures for its execution. As to the latter, I contend that the duty is imposed upon the Congress to do this faithfully and conscientiously, and that it has no discretion as to whether it will or will not do so; and that, if nevertheless it refuses to fulfil this duty, it will have accomplished a revolution in our system upon that point; *i.e.*, the will of the legislature will have triumphed over the will of the constitution-making power — the sovereign.

In the interpretation which the author places upon this part of article 4, section 4, I think he advances a doctrine in reference to the effect of the same upon the *national* governmental system which is strained and unwarranted. He says:

> In this provision the United States binds itself to itself and to its constituent members, to remain forever a republic and, in particular, a federal republic. Within the limits of the conception, republic, the Federal constitution and the state constitutions may be constitutionally subjected to every conceivable change; but the least step beyond these limits on the part of the Union is *ipso facto* legally the dissolution of the Union, unless taken by the consent of every state; and, even in this case, legally a new union would assume the place of the old.[1] [Page 128.]

[1] "In ihr verpflichten sich die Vereinigten Staaten, sich selbst und ihren konstituirenden Gliedern gegenüber, ewig eine Republik, und zwar eine Föderativrepublik

Every constitutional lawyer knows that there is no such limitation upon the amending power to be found in the constitution itself, and that therefore it does not exist at all; and that, on the other hand, there is a limitation upon the regular course of amendment in reference to a point which might be changed and yet the whole system be made even more republican than it now is, *viz.*, the pledged equality of the states in the senate. This dictum of the author is, thus, doubly erroneous. In treating of the process of amendment, on pages 141 and 142, he does not mention the fact of the exception of this one subject from the usual course of amendment. Of course, he is not ignorant of its existence. The omission is, however, one that should be corrected for the sake at least of his European readers.

On page 154 we find the following declaration in regard to eligibility to the gubernatorial office in the several states:

> All male inhabitants of the state, of full age, who possess the right to vote and have been for a certain time citizens of the United States and residents of state are usually eligible to the office.[1]

This is true in reference to only seven states of the thirty-eight. Full age (*Volljährigkeit*) is in this country twenty-one years, as everybody knows; but the constitutions of three of the states require the attainment of the twenty-fifth year; those of twenty-six of the states require the attainment of the thirtieth year; and those of two of the states require the attainment of the thirty-fifth year.[2]

Finally, I have found a little trouble in verifying some of the citations and a few mistakes in translation, as, for example, on

zu bleiben. Innerhalb der Grenzen des Begriffs Republik können die Bundesverfassung und die Staatenverfassungen jeder denkbaren Veränderung verfassungsmässig unterworfen werden, aber der geringste Schritt über diese Grenzen hinaus seitens der Union ist ipso facto rechtlich die Auflösung der Union, wenn er nicht unter Zustimmung jedes einzelnen Staates gethan wird, und auch in diesem Falle würde rechtlich an Statte der alten eine neue Union getreten sein."

[1] "Das passive Wahlrecht pflegt allen volljährigen männlichen Einwohnern des Staates zuzustehen, die das aktive Wahlrecht haben und eine gewisse Zeit sowohl Bürger der Vereinigten Staaten als Einwohner des Staates sind."

[2] Poore's Constitutions. Stimson's American Statute Law, p. 46.

page 22, where the phrase "a more perfect union" is rendered in the German, "eine vollkommene Union"; but I am inclined to regard such errors as typographical, and not to hold the author responsible.

I trust that my minute and, perhaps, too long review of this valuable work will not influence any of my readers to estimate it less highly. I certainly can give no higher evidence of my own appreciation of it than my willingness to spend so much time and labor in its examination. In the criticisms which I have offered I have been animated wholly by the feeling that what is so nearly perfect in the first edition should be made entirely so in the second.

JOHN W. BURGESS.